



**PUBLIC HEARING
BEFORE THE GALLATIN COUNTY CONSOLIDATED
BOARD OF ADJUSTMENT**

**SCOTT AND BRYAN WARWOOD;
APPELLANTS**

**FINDINGS, CONCLUSIONS AND
ORDER**

SUMMARY OF PROCEEDINGS

This matter comes before the Gallatin County Consolidated Board of Adjustment (BOA) on August 19, 2008 as an appeal from the June 10, 2008 decision of the Gallatin County Code Compliance Specialist that the appellants Scott and Bryan Warwood do not have a development right on their parcels in the Reese Creek Zoning District. Specifically, the Code Compliance Specialist determined the appellants may not build a residence (and associated permitted/conditional uses) on the parcels, as the lots were legally created after adoption of the Reese Creek Zoning Regulation, and do not meet the minimum lot size for AR-80 zoning.

Pursuant to MCA Section 76-2-223(a) and Section 5.08 of the Reese Creek Zoning Regulations, the purpose of this appeal hearing was to determine if the June 10, 2008 decision by the Gallatin County Code Compliance Specialist was made in error.

Pursuant to the Reese Creek Zoning Regulations, which was adopted on June 21, 2006, and after legal notice, a public hearing was held before the BOA in Bozeman, MT on August 19, 2008. Notice of the public hearing was published in the Bozeman Daily Chronicle on August 3, 2008, and sent to adjacent property owners via certified mail.

APPLICABLE REGULATIONS

1. The Reese Creek Zoning Regulations and map were adopted by the Gallatin County Commission on June 16, 2006.
2. **Section 2.02 Agricultural and Rural Residential District (AR-80).** The AR-80 District provides for one single family dwelling per 80 acres with additional development rights available through cluster subdivision provisions as described in Section 4.01.

- A. **Section 2.02.2 Tracts of Record (in the AR-80 District).** All legal tracts of land on record with the Office of the Clerk and Recorder at adoption of these Regulations, regardless of size, are entitled to all the uses by right (principal uses) and conditional uses of the AR-80 District designation with an approved Conditional Use Permit (CUP).”
- 3. **Section 5.02 Non-Conforming Lots, Uses and Structures**
 - A. **5.02.1 Intent.** “Nonconforming uses are declared by these Regulations to be incompatible with permitted uses in the district involved. However to avoid undue hardship, nothing in these Regulations shall be deemed to require a change in plans, construction or designated use of any building on which actual construction lawfully began prior to the effective date of adoption or amendment to these Regulations, and which actual construction has been carried on diligently.”
 - B. **Section 5.02.2 Non-Conforming Parcels of Record.** “In any District, structures permitted in said district may be erected on any non-conforming parcel which was of record on the effective date of these Regulations.”
 - C. **Section 5.02.7 Determination of Status of Non-Conforming Land Uses and Structures.** “It shall be the responsibility of the Zoning Enforcement Agent and Code Compliance Specialist to determine the status of non-conforming land uses and structures” based on applicable criteria in the Reese Creek Zoning Regulations. “It shall be the burden of the applicant to prove entitlement for approved non-conforming status by furnishing the Zoning Enforcement Agent and Code Compliance Specialist with a preponderance of supporting information. Such information shall include, but not be limited to septic or sewer hook-up permits, building permits, business licenses, knowledge of past history of the site, and dated photographs.”
- 4. **Section 6 Definition of Lot of Record:** “A lot which is part of a subdivision recorded in the office of the County Clerk and Recorder, or a lot described by metes and bounds, a copy of which has been recorded in the office of the Clerk and Recorder.”
- 5. **Section 6 Definition of Tract of Record:** “An individual parcel of land irrespective of ownership than can be identified by legal description and is independent of any other parcel of land, using documents on file in the records of the County Clerk and Recorder’s Office.”
- 6. **Section 6 Definition of Non-Conforming Parcel:** “A parcel, the area, dimensions or location of which was lawful prior to the adoption, revision, or amendment of a zoning regulation but

fails by reason of such adoption, revision or amendment to conform to the present requirements of the zoning regulation.”

7. Pursuant to MCA Section 76-2-223(a) and Section 5.08 of the Reese Creek Zoning Regulations, the Gallatin County Consolidated Board of Adjustment (BOA) shall hear and decide appeals where it is alleged there is an error made by an administrative official, and it is the BOA’s duty to reverse or affirm, wholly or partly, or modify the June 10, 2008 decision by the Code Compliance Specialist. Pursuant to MCA Section 76-2-224, the concurring vote of three members of the BOA is necessary to reverse the June 10, 2008 decision.

TESTIMONY

8. Joseph (Joby) Sabol II, on behalf of Scott and Bryan Warwood presented three arguments for why the Code Compliance Specialist was in error, and should be overturned.
 - A. **Operation of Law.** Mr. Sabol testified that the Code Compliance Specialist misapplied the legal doctrine of Operation of Law. He cited the Black’s Law Dictionary definition of Operation of Law, described Operation of Law in layman’s terms, and provided examples:
 1. Blacks Law Dictionary: “This term expresses the manner in which rights, and sometime liabilities, devolve upon a person by the mere application to the particular transaction of the established rules of law, without the act or co-operation of the party himself.”
 2. Operation of law means that things happen in this world, in various transactions, because the law directs them to, by operation of law. It happens in an instant, and nothing further is required by the parties to complete that transaction.
 3. An example of operation of law would be where a husband and wife hold property by joint tenancy, including the right of survivorship. What that means is the survivor automatically by operation of law inherits the decedent’s interest. The transfer does not require a deed or recording at the courthouse. It happens automatically at the death of one spouse.
 4. Another example would be when you go to buy a car, you pay your money and drive away. You do not have a title to the car, but you know you own the car, and the bank, the insurance company, and the law also know you own the car. The DMV has

not processed the paperwork, and the title does not show up for a week or two, but that does not mean you did not own the car for that week or two. That does not mean that Scott and Bryan Warwood did not own the property for the year and a half it was tied up in probate. They owned the property at the moment of Gladys Warwood's passing.

5. In 1943, the Montana Supreme Court, in *Montgomery versus First National Bank of Dillon*, asserted that, "It is elementary that the real property of a deceased person vests in his devisees 'from the moment of his death, subject only to the right of the executors to possession for the purposes of administration.'"

6. The operative phrase is "the moment of death." From the moment of Gladys Warwood's passing, Scott and Bryan Warwood were vested with the interest in that property. They own what their grandmother intended to give them. There was a bureaucratic process that followed. However, they owned the car when they drove it off the lot, and the title showed up later. The Code Compliance Specialist missed this distinction.

7. In response to a question from the BOA, Mr. Sabol stated that Gladys Warwood's will did not describe particular parcels, portions or areas, and that the Warwoods would have received undivided interest. He further stated that is why there was a subsequent partition action as part of the probate process.

B. **Definitions.** Mr. Sabol stated that the Code Compliance Specialist blurred the distinction between the definitional sections and other verbiage in the zoning document. He cited the definitions for "lot of record" and "tract of record" (Numbers 4 and 5 above) and testified that:

1. The purpose of the definitional section is to define terms so they are understood and uniformly applied through the document.
2. The definitions of "lot of record" and "tract of record" in the Reese Creek Zoning Regulations do not require the tract to exist at the time zoning was adopted.
3. Scott and Bryan Warwood drove their car off the lot, and the title showed up later.
4. The section on nonconforming uses requires a tract to exist at the time zoning was adopted. However, if you support the Code Compliance Specialist, you are ignoring the definitions.

C. **Court's Involvement.** Mr. Sabol testified that that the Warwood's probate case is before the District Court, including the disposition of assets and subsequent partition action. The District Court did not have jurisdiction to decide the zoning issue of development rights because the question was not properly before them.

9. Bryan Warwood testified as follows:

- A. Bryan explained that the partition action did not result in a 50% split to John and Barbara Warwood, with the remaining 50% to other heirs because John and Barbara chose to give up acreage in order to keep the house, shop, and water rights on the property. As a result, the remaining heirs received additional acreage.
- B. Bryan stated that a decision was made for the partition in October (2007), but that discussions regarding the proposed division had been ongoing for several years. Water rights were an issue, the District Court took two years to act, and their attorney Ed Sedivy was frequently out of state.
- C. Bryan stated that notices for Reese Creek zoning formation were sent to the personal representative (John Warwood), and that Scott and he lived elsewhere and did not receive any notices.

10. Jim Loessberg (11550 Gee Norman Road) stated that he is a resident of the Reese Creek Zoning District and was Chairman of the Reese Creek Zoning Working Committee. Mr. Loessberg testified in support of a decision to affirm the Code Compliance Specialist, commented on the June 25, 2008 letter written by Scott and Bryan Warwood, and refuted Mr. Sabol's testimony.

A. **Comments regarding June 25, 2008 Letter.**

- 1. He believes Scott and Bryan Warwood were aware of the zoning process that was underway. Their letter states that they were concerned about their development rights. Nettie Warwood, John Warwood, and Dana Doney were receiving notices of the zoning formation meetings, and Scott attended one of the first meetings with Nettie. Neither Scott nor Bryan attended a meeting to express concerns about their development rights. Had they done so, the working committee would have listened to and considered their concerns. The working committee held about 54 meetings. There was ample opportunity for them to voice their concerns.

2. The letter states that Scott and Bryan were told their development rights would be grandfathered. However, the Reese Creek Zoning Working Committee did not make this guarantee, and he does not believe the county said that either. John Vincent, former County Commissioner, sent a letter to Judge Salvagni stating that the parties will not be able to exercise five development rights (November 30, 2006). Victoria Drummond (former County Planner) also met with the Warwoods and told them how they could get development rights.
3. Scott and Bryan assert that granting development rights on their 40 acre parcels is fair and reasonable since adjacent properties are already divided into 20 acre parcels. Mr. Loessberg testified that these 20 acre parcels were created prior to adoption of zoning, and prior to requirements for subdivision review of 20 acre parcels, and is not significant to the decision at hand. The Working Committee recognized those tracts as nonconforming parcels (see definition of a nonconforming parcel in #6 above).
4. Scott and Bryan assert that all they have is dry agricultural ground of greatly diminished values if they do not have development rights. Mr. Loessberg stated that nobody is telling Scott and Bryan that they do not have any development rights, only that the land must be developed in a fashion that meets the Zoning District standards for clustering.
5. Scott and Bryan allege granting their request for development rights will not set a precedent. However, Mr. Loessberg stated that this decision will set a precedent with respect to Dana Doney and Nettie Warwood's tracts. If the request is granted, both Dana and Nettie may later ask for the same development rights, and Gladys' will did not leave any property to Nettie.

B. Comments regarding Mr. Sabol's testimony

1. Mr. Loessberg stated that he is a Financial Advisor. He agreed with Mr. Sabol that in joint survivor ownership, unlimited amount of assets can automatically be transferred by operation of law. However, Mr. Loessberg stated that a different set of rules and regulations regarding taxation apply for a transfer to a spouse versus a transfer to a non-spouse. Mr. Loessberg agrees with Mr. Sabol that Scott and Bryan received property when Gladys Warwood passed away. However, Mr. Loessberg asserts that the assets are transferred in the same frame

as they were on the point of death, which in this case was one single, large piece of property. The argument for joint survivor ownership actually supports a decision to affirm the Code Compliance Specialist.

2. Mr. Loessberg disputed Mr. Sabol's analogy to buying a car and getting the title later. He stated that you get what you pay for at the time the transaction is made. You cannot go back to the dealer later and say I want blue instead of red, or I want 4-wheel drive instead of 2-wheel drive, and expect the car dealer to honor additional transactions.
3. Mr. Loessberg agreed with Mr. Sabol that it wasn't the District's Court's responsibility to decide the issue of development rights. That responsibility lies with Gallatin County, and the County said no.
4. With regards to Mr. Sabol's argument about the definitions of parcels and tracts of record, Mr. Loessberg asserts that everyone else in Reese Creek understands what parcel or tract of record, and nonconforming means.

- C. Mr. Loessberg asserted that the Warwood's family partnership did not have to be dissolved in order to divide the property in accordance with the zoning regulations, sell parcels, and split the profits. It would have just required the Warwoods to work together.
- D. Mr. Loessberg stated that the bottom line is there is a zoning district in force, and these lots did not exist before the zoning went into place. The Reese Creek Zoning Regulations were passed with 72% of the landowners representing 78% of the land, including positive votes from Dana Doney, Nettie, John and Barbara Warwood.

10. Melissa Blessing (11832 Gee Norman Road) testified that she is a resident of the Reese Creek Zoning District, and was involved with the formation process of the Reese Creek Zoning Regulations. She testified in support of a decision to affirm the Code Compliance Specialist.

- A. The terms of Gladys Warwood's will were known to the appellants before and during the three years zoning was underway. The fact that probate was not complete until after the Zoning Regulations were approved did not impinge upon the appellants' ability to prepare groundwork for its eventual disposition by advocating for themselves during the zoning process. Scott and Bryan Warwood chose to allow the regulations to form without attempting to advocate for their eventual development rights, which they could have done at any time for the three years the community was working on it.

- B. The 238-acre Warwood property was vested whole, and the division was an action that occurred later. The zoning regulations provide a clustering option to form new parcels. The Reese Creek Zoning Regulations should be supported, and Scott and Bryan should avail themselves of the options offered therein.
11. Victoria Drummond, a former Gallatin County Planner, testified she met with the Warwoods on October 5, 2006 (Scott, Bryan, Dana & Nettie, and a surveyor Greg Finch) and on December 18, 2006 (Scott, Bryan and Nettie) to discuss their options for dividing their land in compliance with the Reese Creek Zoning Regulations. She further stated that she sketched out a division on both occasions that would comply with cluster subdivision provisions in the Reese Creek Zoning Regulations.
12. In appellant rebuttal, Mr. Sabol, representing Scott and Bryan Warwood, testified:
- A. Scott and Bryan were held hostage by the probate process, and did not have any control over the probate process, including the length of time. They are not the personal representative of the estate. The timing for probate and the zoning process did not dovetail, and an injustice has been visited upon these gentlemen at no fault of their own.
- B. Mr. Sabol testified that this decision will not open a floodgate of heirs wanting to do this. This is an extremely unusual circumstance, and cases are evaluated on a case by case basis.
- C. The Supreme Court says from the moment of death the real property of the deceased vests in his devisees. The doctrine of operation of law and the definitional section of the Reese Creek Zoning Regulations are being ignored.
- D. Mr. Sabol acknowledged that there are tax consequences that occur with transfers of property by operation of law when there are joint tenants with right of survivorship. But that does not mean you have to be a spouse to automatically receive a transfer.
13. In appellant rebuttal, Bryan Warwood testified:
- A. Scott and he appealed the decision appealed the Code Compliance Specialist's decision to the BOA, but Dana and Nettie are in the same situation and equally affected by the outcome.
- B. The partnership dissolved as a part of the probate process, which was controlled by John Warwood and the estate, which was also John. Scott and he did not have a say.
- C. A cluster subdivision proposal would have required John and Barbara Warwood's participation, and they were unwilling to transfer any development rights or do any

other division of property than what was already agreed upon. They did not opt for the clustering option because at most they had three development rights with four property owners.

- D. Ed Sedivy, the lawyer for the estate, told them their development rights would be grandfathered pursuant to the subdivision laws of Montana. That is why Bryan and he did not attend the zoning meetings or look further into the zoning. They were told that once probate goes through, that they will have these parcels of land with building rights.

FINDINGS OF FACT

14. Gladys Warwood (Scott and Bryan Warwood's grandmother) died in 2002.
15. The Reese Creek Zoning Regulations and map were adopted on June 21, 2006.
16. The Gladys Warwood estate was still in the process of being probated when the Reese Creek Zoning Regulations were adopted. At that time, there was no division of land on the 238-acre parcel.
17. On November 16, 2007, Certificate of Survey 2650 was filed at the Clerk and Recorder's office as the result of a court ordered partition action. Scott Warwood is the record owner of Tract D and Bryan Warwood is the record owner of Tract B, both of which are 40-acre parcels.
18. Tract B and D of COS 2650 are located in the NE ¼ and NW ¼, of Section 14, Township 2 North, Range 5 East, PMM, Gallatin County, Montana. The tracts are located in AR-80 District of the Reese Creek Zoning District.
19. Pursuant to Section 2.02 of the Reese Creek Zoning Regulations, the Agricultural and Rural Residential (AR)-80 District provides for one single family dwelling per 80 acres with additional development rights available through cluster subdivision provisions as described in Section 4.01.
20. On November 30, 2006, former County Commissioner John Vincent sent a letter to Judge Salvagni stating that the Warwoods will not be able to exercise five development rights under the existing partition proposal due to the location of the subject property in the AR-80 District of the Reese Creek Zoning District.
21. The District Court did not assign development rights to any of the parcels when it approved the partition action in 2007. The Court found that it did not have the jurisdiction to do so under § 72-3-914 or § 72-3-201 MCA and elected to grant the request for the partition without

referencing zoning development rights, without prejudice to either party if an issue of zoning development rights arises in the future.

22. Collectively, the Warwood tracts in COS 2650 are adjacent to an area zoned AR-40 (one single family dwelling per 40 acres as a principal use). Section 5.07 allows for, and provides a process to amend the boundaries of the zoning map whenever the public health, safety and general welfare require such an amendment. Scott and Bryan Warwood have not applied for a zone map amendment.
23. On March 17, 2008, Scott and Bryan Warwood submitted a request for a non-conforming use determination to Gallatin County.
24. On June 10, 2008, the Gallatin County Code Compliance Specialist determined that Scott and Bryan Warwood do not have a development right on their parcels in the Reese Creek Zoning District. Specifically, the Code Compliance Specialist determined that the appellants may not build a residence (and associated permitted/conditional uses) on the parcels, as the lots were legally created after adoption of the Reese Creek Zoning Regulation, and do not meet the minimum lot size for AR-80 zoning.
25. On June 25, 2008, Scott and Bryan Warwood sent a letter to members of the Board of Adjustment regarding their appeal, and a complete copy of this letter was included as Exhibit B in their appeal. All members of the BOA stated prior to the hearing that receipt of this letter prior to this hearing did not influence their decision, and that they could serve on the BOA for this issue without bias.
26. On June 27, 2008, Scott and Bryan Warwood filed an appeal of the Code Compliance Specialist's June 10, 2008 decision to the Gallatin County Consolidated Board of Adjustment. The appeal was timely.

CONCLUSIONS

27. After considering public testimony and in board discussion, the Gallatin County Consolidated Board of Adjustment (BOA) concludes:
 - A. To adopt positions stated by individual board members during board discussion, as stated in the audio record, into this Findings, Conclusion and Order.

- B. To adopt and incorporate the findings contained in the Code Compliance Specialist's staff report, including the Compliance Findings and the Rationale for the Decision, into this Findings, Conclusion and Order.
- C. Appellant's argument that the Code Compliance Specialist was in error based upon the definitions in the Reese Creek Zoning Regulations is unpersuasive. If a timing element were inserted into the definition of a "tract of land" then the term would be rendered useless as a definition for any other purpose. Definitions are simply definitions, and are used in the context of sentences and phrases to lend them meaning. The body of the regulation prevails. Section 5.02.2 of the Reese Creek Zoning Regulations requires a tract of record to be in place on the effective date of these regulations. There is nothing ambiguous to this section.
- D. Scott and Bryan Warwood have a "lot of record" or "tract of record" as defined in Section 6 of the Reese Creek Zoning Regulation. However, they do not have a "non-conforming parcel" which is also defined in Section 6, nor do they meet the standards in Sections 2.02.2 and 5.02.2 because the lots were not legal tracts of record prior to adoption of the zoning regulations (June 21, 2006). In order for a "lot of record" or a "tract of record" to be classified as a "non-conforming parcel" and also comply with Sections 2.02.2 and 5.02.2, the tract had to be created prior to June 21, 2006. The Warwoods failed to obtain nonconforming status.
- E. Appellant's argument that the Code Compliance Specialist was in error based upon the Doctrine of Operation of Law is unpersuasive. Interest in the shares of the 238-acre parcel was conveyed at the time of Gladys Warwood's death, but the division of land was not. Upon Gladys Warwood's death, Scott and Bryan Warwood only received undivided interest in one large parcel of land.
- F. Under the terms of Gladys' will, 50% interest in the property went to John Warwood, and the other 50% interest should have been equally split between Scott, Bryan and Dana, i.e, the "issue" of Robert who was deceased. Nettie, the spouse, is not an "issue." However, the parcels that were created by the partition action and Bryan Warwood's testimony indicate that the partition was not based upon equal acreage. Rather, interests were divided up according to water rights and buildings. An equal share of parcels was not automatically created at the time of Gladys Warwood's death.

- G. A motion was made by Member Strung, and seconded by Member Linderman to affirm the June 10, 2008 decision by the Code Compliance Specialist. Pursuant to MCA Section 76-2-223(a) and Section 5.08 of the Reese Creek Zoning Regulations, the BOA unanimously concludes that the Code Compliance Specialist was not in error when she determined Scott and Bryan Warwood do not have a development right on their parcels in the Reese Creek Zoning District, as the lots were legally created after adoption of the Reese Creek Zoning Regulation, and do not meet the minimum lot size for AR-80 zoning.

DETERMINATION AND ORDER

The BOA having made and adopted the above findings of fact and conclusions as a part of this determination, and after due deliberation and consideration of all the facts, circumstances, rules, laws and regulations, and after carefully considering the testimony, documents, exhibits, and submissions in this case enters a determination that the Code Compliance Specialist was not in error and the June 10, 2008 decision is hereby AFFIRMED.

Gallatin County Consolidated Board of Adjustment

Robert Schultz, Chairman

Date